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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 324

THE UNITED STATES OF AMERICA
Plaintiff in Error

vs.

L. COHEN GROCERY COMPANY
Defendant in Error

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

JOHN A. MARSHALL,
THOMAS MARIONEAUX,
D. N. STRAUP,
JOEL F. NIBLEY,
As amici curiae.

W. F. ROBERTS CO. WASHINGTON D. C.

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MOTION

Now come John A. Marshall, D. N. Straup, J. F. Nibley and Thomas Marioneaux, of Salt Lake City, Utah, and represent to this Honorable Court that they are of Counsel for the Utah-Idaho Sugar Company, a corporation and its directors against whom there is pending an indictment in the District Court of the United States, for the District of Utah, for alleged violation of Section 4 of the Act of August 10, 1917 (as amended Oct. 22, 1919, Sec. 2, Chap. 80, Stat. 1919), and against whom complaints have been filed for alleged offenses against said statute in the States of Idaho and South Dakota.

That in said prosecutions in said States the charges are that the defendant sold sugar at "unjust and unreason-

able rates and charges," and that the constitutionality of said section of said statute, and the proper construction thereof, are necessarily involved; and that said questions are involved in the instant case and in numerous prosecutions pending in the United States District Courts throughout the country, and are therefore of great public interest.

Wherefore we have prepared a brief discussing said questions and ask leave to file it as *amici curiae*, both the plaintiff and the defendant in error having consented that such leave may be granted if to this Honorable Court such leave shall seem meet and proper.

JOHN A. MARSHALL,

THOMAS MARIONEAUX,

D. N. STRAUP,

JOEL F. NIBLEY,

As amici curiae.

October 9, 1920.

Supreme Court of the United States.

OCTOBER TERM, 1920.
No. 324.

UNITED STATES OF AMERICA,
Plaintiff in error,
vs.
L. COHEN GROCERY COMPANY,
Defendant in error.
IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 337.

HARRY B. TEDROW, United States Attorney,
Appellant,
vs.
A. T. LEWIS & SON DRY GOODS COMPANY, et al.,
Appellees.
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FILED BY LEAVE OF COURT IN BEHALF OF LAKE & EXPORT COAL CORPORATION.

WILLIAM D. GUTHRIE,
BENJAMIN F. SPELLMAN,
BERNARD HARGROVE,
Amici Curiae.

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Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 324.

UNITED STATES OF AMERICA,

Plaintiff-in-error,

vs.

L. COHEN GROCERY COMPANY,

Defendant-in-error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 357.

HARRY B. TEDROW, United States Attorney,

Appellant,

vs.

A. T. LEWIS & SON DRY GOODS COMPANY, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FILED BY LEAVE OF COURT IN BEHALF OF LAKE & EXPORT COAL CORPORATION.

STATEMENT.

The Lake & Export Coal Corporation is a West Virginia company engaged in the business of buying and selling coal. In August of this year warrants were issued against it and its officers charging them with having violated the so-called Food Control or Lever Law (act of Congress of August 10, 1917, as amended by the act of

October 22, 1919—40 Stat. 276, c. 53; 41 Stat. 297, c. 80) by having sold some coal at an unjust and unreasonable price. No hearing has yet been had upon these charges. The company and its officers, however, are directly interested and will hereafter be materially affected by the determination of the questions concerning the constitutionality of the Lever Law raised in the above entitled cases.

The following argument is addressed to the consideration of three propositions relating to the validity of the enactment in question with a view to establishing that it is unconstitutional in at least three respects, namely: (1) that it violates the Fifth and Sixth Articles of Amendment to the Constitution of the United States, inasmuch as the offense denounced as a felony in the statute is defined only as the act of making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"; (2) that the enactment violates the Fifth Article of Amendment to the Constitution of the United States, inasmuch as it arbitrarily sets up a favored class by exempting farmers, gardeners, coöperative societies, etc., from the operation, requirements and penalties of the statute in and by the provisos to section 4 of the act as amended October 22, 1919, and (3) that the enactment is void as an attempt by the Federal Government to continue the exercise of war power at a time when there is no war emergency to authorize such an interference with the rights of the several States and the persons therein.

The statute as originally passed on August 10, 1917, and as amended on October 22, 1919, is long and treats of many matters, and, as it will undoubtedly be fully laid before the court by counsel for the parties in the cases

at bar, it is not deemed necessary to set it forth at length in this brief. For the purposes of the present discussion, it is sufficient to refer to the provisions of sections 1 and 4 as amended in October, 1919. These read as follows, the recent amendments of October 22, 1919, being italicized:

> "That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement of foods, feeds, *wearing apparel, containers primarily designed or intended for containing foods, feeds, or fertilizers;* fuel, including fuel oil and natural gas, and fertilizers and fertilizer ingredients, tools, utensils, implements, machinery and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation, and private controls affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act. . . .
>
> "Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or de-

vice, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other persons, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent, limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof; or (e) to exact excessive prices for any necessaries, or to aid or abet the doing of any act made unlawful by this section. *Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon land owned, leased, or cultivated by him: Provided further, That nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them.*"

It will be observed that the new offense created by the recent amendment of 1919, that is, of making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," is not accompanied by any standard or definition of what is intended by the terms "unjust or unreasonable rate or charge". Nor is there set up in the statute any administrative body charged with the duties of fixing and promulgating just or reasonable rates or charges for necessaries. The duty of deciding what is a just or reasonable rate in every case is thus cast upon the individual, under the penalty of be-

ing convicted of a felony if his best efforts and most conscientious judgment should fail to accord with the views of a jury afterwards.

I.

The lever law violates the fifth and sixth amendments to the constitution.

It is a fundamental principle not open to dispute that "laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid" (Mr. Justice Washington in *United States* v. *Sharp*, Peter C. C. 118, 122). See also *United States* v. *Reese*, 92 U. S. 214, 220; *United States* v. *Brewer*, 139 U. S. 278, 288; Bishop on Statutory Crimes, 3rd ed., sec. 41. There can be no question that it was in the light of this principle that the constitutional guaranty embodied in the Sixth Amendment was written, entitling an accused person "to be informed of the nature and cause of the accusation". Perhaps nothing was more abhorrent to the framers of the Constitution than the English doctrine of constructive crimes and the entrapment of innocent persons by vague penal laws through the medium of judicial interpretation. An eminent jurist and contemporary of the framers of the Constitution has left a striking evidence of this fact. In 1822 Edward Livingston presented to the Louisiana legislature his famous

Report on the Plan of a Penal Code.* Referring to the system of criminal law in England in the eighteenth century, he said (Works of Edward Livingston on Criminal Jurisprudence, Chases ed. 1873, vol. I, pp. 12, 170):

> "This dreadful list [of offenses] was increased by the legislation of the judges, who declared acts which were not criminal under the letter of the law, to be punishable by virtue of its spirit. The statute gave the text, and the tribunals wrote the commentary in letters of blood; and extended its penalties by the creation of constructive offenses. The vague, and sometimes unintelligible language, employed in the penal statutes; and the discordant opinions of elementary writers, gave a colour of necessity to this assumption of power; and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies; quartered for constructive treasons; and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. . . .
>
> "What the law forbids, is an offense; but the law cannot forbid without being perfectly intelligible . . . An ambiguous penal law is no law; and judicial decisions cannot explain it without usurping authority which does not belong to them."

And Macaulay in his famous Report upon the Indian Penal Code among other pertinent remarks declared (4 Misc. Works at p. 170):

> "That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely-worded law is no law, and to whatever extent a legislature uses vague expressions, to

*The authority of Edward Livingston as one of the great jurists of the world is indisputable. La Législation Criminelle de Livingston has long been a standard work on criminal law in France. Macaulay repeatedly acknowledged his debt to Livingston's reports, and spoke of him as "high authority" in connection with the Indian Penal Code (Notes on Indian Penal Code).

> that extent it abdicates its functions, and resigns the power of making law to the courts of justice."

But whatever may be permissible in England or elsewhere, under the Constitution of the United States no law-making power whatever can be devolved upon the courts, for it is provided that "all legislative powers . . . granted shall be vested in a Congress," etc.

It is submitted, therefore, that it is essential to the validity of the penal statute under consideration that its prohibition shall have definiteness and certainty; and these qualities it cannot have unless the ordinary significance and effect of the statutory term "unjust or unreasonable rate or charge" is "perfectly intelligible", as Livingston expressed it, or "so explicit . . . that all men . . . may know what acts it is their duty to avoid," as Mr. Justice Washington declared. The inquiry must, consequently, resolve itself into the question, Is there any reasonable test or standard by which all men may know beforehand what is an "unjust or unreasonable rate or charge"? Some of the suggested tests or standards may now be considered.

It has been suggested that the test or standard is the amount of *profit* made in a given transaction. But the statute is wholly silent upon the subject of profits. Its prohibition is not against unjust or unreasonable *profits*, but solely against unjust or unreasonable *rates* or *charges*. Accordingly, several courts have ruled that sales without profit, or even at a loss, may violate the law! Thus, District Judge Connor of the Eastern District of North Carolina declared in *United States* v. *Myatt*, 264 Fed. 442, 450, that—

> "The statute does not declare it unlawful to make an unjust or unreasonable *profit* upon sugar. The

profit made is not the test, and may be entirely irrelevant to the guilt of the defendant. He may, within the language of the statute, make an unreasonable and therefore unlawful, 'rate or charge' without making any profit, or the rate or charge made may involve a loss to him upon the purchase price."

It would, indeed, be entirely within the literal meaning of the language of the statute for a juror to hold that a very low price was unjust or unreasonable. He might reason that such a transaction or "cut-rate," as it is called, was prejudicial to the public interests, and that, if continued by the same trader or others, its natural tendency and ultimate result would be to drive other traders in the particular commodity out of business, and thus, in the end, bring about unduly high prices, because only a few competitors could remain in the field.

Again, it has been suggested that the profit earned by the individual is not the test, but that the price must be one that will afford a fair profit *in general* in the particular trade or business (Hand, D. J., in charging a grand jury). But, if a trader based his charges upon that theory, and, because he had bought cheaply long before, earned a large profit, there is nothing in the act which would prevent a jury from finding such an individual guilty, because they regarded the profit as "unjust or unreasonable."

Nor is there any escape from the vagueness of the act in recourse to any particular *percentage* of profit. No matter what rate be chosen, a juror may believe it unjust. Again, under this test, an individual who had bought several articles of the same nature at different times and at different prices, would have to offer them at different prices, even though he put them up for sale at the same

moment. Obviously, the public might regard it as wholly unjust or unreasonable that identical articles lying upon one counter at the same time should be the subject of different prices, and quite plainly none would be sold except the cheapest. Nevertheless, District Judge McCall of the Western District of Tennessee, in a charge to a grand jury, stated that if a shoe dealer had bought two lots of exactly the same kind of shoes at different times and at different prices, the first lot at eight dollars per pair and the second lot after the price had gone up to twelve dollars per pair, "and then he sells both lots of those shoes at eighteen dollars, he is profiteering clearly upon the first lot that only cost him eight dollars. Now, he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the twelve dollar shoes." On the other hand, District Judge Holmes of the Southern District of Mississippi has declared that—

> "Although you may consider the price he paid along with the other evidence, you should consider also, and I think should give more weight to, the replacement value of the article than to the original cost."

The basis upon which any given rate of profit should be calculated is also a fertile source of danger and dispute. The cost price may be regarded as too high and, therefore, unjust or unreasonable as a basis.

The right of an individual to compute his profit with reference, not to any single transaction, but to the

business as a whole over a period of a year, or a season, or a month, has been widely disputed in every aspect. A jury may find a particular sale to be criminal because, by itself, it showed a large profit, while that profit might in fact be wholly offset and exceeded by the preceding losses of the business of the month, season, or year. Where many sales and dealings in different lines of articles make up a business, it is all but inevitable that such a state of affairs should constantly come about.

There is likewise no protection in selling at the *market price*. Where one has bought cheaply and the market price has subsequently advanced, it involves the risk of committing a felony to sell the property at the current rate.[1] The possible large profit involved in such an act may seem to a jury unjust or unreasonable. District Judge Howe, in charging the jury in *United States* v. *Leonard* in the Northern District of New York, told them that they were to consider "what prices the defendants paid for the goods . . . *but not how much the market price had advanced from the time the goods were purchased to the time they were sold.*" Indeed, it is everybody's knowledge that the efforts of the Government under the statute in question are being directed towards preventing persons from securing the market price for their wares. It is the Government's contention that the statute was called into existence precisely because the market prices were too high. Therefore, a defendant is guilty of this new crime if he sells at the current market rate, even though he has done nothing towards fixing

[1] See, for example, *United States* v. *Eisenblum*, 264 Fed. 578, where an individual was indicted for selling sixty pounds of sugar at twelve and a half cents a pound, a price that would have been considered cheap almost anywhere else in the country at the time.

that rate nor consulted with any one about it. Indeed, if he did so consult with his fellow tradesmen, no one can doubt that he would be indicted for conspiracy as well as for profiteering.

Even a price fixed by an administrative commission has evoked threats of prosecution (*Detroit Creamery Co. v. Kiewster*, 264 Fed. 845, 846), and a United States Attorney has declared that a sale at public auction might constitute a violation of the law.

Curious and oppressive situations may readily come about under the terms of the statute. Thus, for example, a trustee may be surcharged by the court for failing to secure a particular price upon disposing of the trust property, when, if he had thus sold, a jury would convict him as a profiteer. An agent selling at a price fixed by his principal may be convicted because, although he knew nothing about it, his principal had bought cheaply and was thus realizing a large profit; while another jury might acquit the principal because it deemed the price paid to him to be no more than others were getting. Indeed, not even a receiver conducting a business, or selling a piece of property to the highest bidder at a public sale, would be immune from conviction, if the prices he procured were more than a jury deemed just or reasonable. And the gravest iniquity of all lies, not alone in the fact that one jury may convict for the same act for which another jury may acquit, but in the fact that each of the jurors who concur in a conviction may arrive at his conclusion upon grounds entirely at variance with those of every other of his colleagues, so that, even after a trial and conviction, it would be impossible for their views (if the defendant could somehow have the benefit of them) to

serve any useful purpose in guiding and directing his future conduct.

The statute also leaves it in doubt whether the rate or charge must be just to the buyer or just to the seller or just to both. A tradesman who deals with rich and poor customers may believe it just to sell more cheaply to the latter, but a jury might convict him for not treating all alike; and, on the other hand, there is nothing in the enactment to prevent another jury from finding a charge unjust because it does not give consideration and regard to the means, condition and ability to pay of different classes of buyers.

The just or reasonable rate of to-day, or, indeed, of an hour ago, may be the basis of a conviction for felony if continued in force another day or another hour. The statute affords not even a single moment of security and repose. It is a strange commentary on the enactment in question that in one breath (see section 6) it forbids hoarding of necessaries under grave penalties and thus forces a tradesman to make sales, while in the next it lays his *every* act of selling under the dire threat of a prosecution for an infamous crime. And the terrifying extent of this threat will be better appreciated when it is realized that the enactment covers *all necessaries*—all that we eat, wear, use, burn, etc., etc.

The statute remits to the jury also all the mooted questions of cost accounting. The proper elements of overhead expenses, the extent to which each may be allowed in a given case and in respect of a single transaction, and the multitude of other factors which enter into modern business accounting science. It is not enough that the defendant has dealt with these questions in a

usual or scientific, or even in the most accepted, manner; the jury may deem justice and reasonableness to be on the other side, and no one can do more than hazard a guess as to the outcome.

It has been said that it is the *real or true value* only which one may charge. But what is that and how is it to be arrived at? The statute does not say; and as it is not the market value and may not result in a profit or in a loss, where does it exist as a fact? Manifestly the *real or true value* is as completely a matter for conjecture and speculation by juries as would have been the statutory crimes which this court invalidated for indefiniteness in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, and *Collins* v. *Kentucky*, *id.* 634, where the statutes in question attempted to allow juries to speculate upon the question of whether a given combination did or did not raise prices above the "real value," at the risk of the defendant's liberty and property.

It is, therefore, submitted that the statute places the guilt or innocence of ordinary business transactions entirely in the field of conjecture. Indeed, there is no transaction involving a rate or charge, which may not be seized upon by a jury to convict. Whether it result in a profit or a loss the jury may, nevertheless, deem it unjust or unreasonable. There is no ordinary act of merchandising in necessaries which a jury may not, if it please, challenge as unfair or unreasonable under the statute in suit; and the plain practical effect of the statute is to leave all business in necessaries wholly at the mercy of the whim or caprice of prosecuting officers and juries.

It is indisputable that statutes, and especially criminal statutes, must be considered in the light of their

natural operation and practical effect (*Bailey* v. *Alabama*, 219 U. S. 219, 244); and, so considered, it is plain that the statute now before the court carries a threat of prosecution and conviction whenever necessaries are sold or handled. The case is, therefore, plainly not like the one before the court in *Nash* v. *United States*, 229 U. S. 373, where, as was subsequently pointed out in *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, there were two perfectly obvious extremes—"the obviously illegal and the plainly lawful"—within which the ordinary man might safely keep. Under the Lever Law there is no "plainly lawful" course open to an individual. He may not hoard; he must sell; and if he does sell, he may be convicted because some jury may be dissatisfied with *any* price he may receive upon *any* sale. Such a state of affairs is mere terrorism, not law. It presents in fact a situation even worse than that which Mr. Chief Justice Waite had in mind when he said in *United States* v. *Reese*, 92 U. S. 214, 221:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government."

In the case at bar it is not open even to the court to say who shall be detained and who shall be set at large, but the whole matter is left to the untrammelled will of the jury. The evils to be apprehended from judicial legislation are enormously exceeded and intensified by this new instrument of tyranny and oppression—irresponsible, inconsistent and secret *jury legislation* and condemnation in and by one and the same act.

The statute is, in final analysis, the same in substance and effect as the provision of the Chinese Penal Code to which Mr. Justice Brewer referred in *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876, namely:

> "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

And this aspect fully justifies the stringent criticism visited upon the statute, and any system of jurisprudence which would sustain it, in the following passage from the opinion of District Judge Faris in one of the cases at bar (*United States* v. *L. Cohen Grocery Co.*, 264 Fed. 218, 223):

> "If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or a wrongful or criminal act, shall be deemed guilty of a felony, and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal."

The foregoing reasons, *inter alia*, have led a number of the lower federal courts to the conclusion that the statute under discussion is unconstitutional. *United States* v. *L. Cohen Grocery Co.*, 264 Fed. 218; *Detroit Creamery Co.* v. *Kinnane*, 264 Fed. 845; *Lamborn* v. *McAvoy*, 265 Fed. 944; *A. T. Lewis & Son Dry Goods Co.* v. *Tedrow*, D. C. Col., Lewis, D. J., April 9, 1920; *United States* v. *Bernstein*, D. C. Neb., Woodrough, D. J., June 8, 1920; *United States* v. *People's Fuel Co.*, D. C. Ariz., Dooling, D. J., etc.

In passing upon a demurrer to an indictment in the case of the *Cohen Grocery Co., supra*, District Judge Faris said (264 Fed. at pp. 220, 223):

> "This statute makes it a felony for any person—which, I take it, includes a corporation as well—willfully to make any unjust or unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might say that a charge of 25 cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen cannot at any given moment know whether he is a felon or a patriot. . . . .
>
> "No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is therefore no better than lynch law.
>
> "The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality."

In granting a permanent injunction in the *Detroit Creamery Co.* case, *supra*, against the enforcement of the portion of the Lever Law now under consideration, District Judge Tuttle declared (264 Fed. at p. 850):

"It seems clear that an indictment which, following the language of this statute, charged a person with merely having made an 'unjust' or 'unreasonable' rate or charge in handling or dealing in or with any necessaries, would be wholly insufficient to inform such person of the nature and cause of the accusation thus made.

"Such an indictment, however, could not specify the offense thus charged with any more detail, for the reason that the statute purporting to create such offense does not state the facts, acts, or conduct necessary to constitute the crime denounced. What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a

rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable?

"These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion or opinion of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law."

And in similarly disposing of the case of *Lamborn* v. *McAvoy*, 265 Fed. 944, 948, District Judge Thompson spoke in part as follows:

"The present statute leaves it open to the jury to determine whether it is unreasonable or unjust to make the rate or charge for necessaries, depending upon any number of undefined circumstances which may enter into the transaction. It leaves it uncertain, for instance, whether a man may lawfully base the price of his commodity upon a profit over the original price he paid for the identical article sold, whether he may lawfully make a price based upon general market conditions, whether he may make a profit based upon the average cost of a number of similar purchases, whether his selling price may be based upon the cost he would have to incur to replace the merchandise, and in general the jury may speculate as to any line of conduct, whether it

would or would not justify a rate or charge, in determining whether it was unjust or unreasonable.

"While in the *Standard Oil Case*, 221 U. S. 1, and the *American Tobacco Co. Case*, 221 U. S. 106, the rule of reason was applied to limit the application of the Sherman Act as follows:

'Thus not specifying, but indubitably contemplating and requiring, a standard, it follows that it was intended that the standard of reason, which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided'

—in the statute now under consideration there is no standard of reason upon which a jury could find the conduct of the accused to be unreasonable or unjust which had been applied at the common law and in this country, but the entire question of the guilt or innocence of the accused is to be determined upon the opinion of a jury whether the conduct of the accused has been unjust or unreasonable."

In sustaining a demurrer to an indictment, District Judge Dooling for the District of Arizona, ruled in the case of *United States* v. *People's Fuel & Feed Co.* (not yet reported), as follows:

"The guilt or innocence of an individual under [the statute in question] is not made to depend upon standards fixed by law, but upon what a jury might think as to the justice or injustice, the reasonableness or unreasonableness, of rates or charges made by him in handling or dealing with necessaries.

"I cannot forecast the action of other courts, but it is my own firm conviction that no one should be put upon trial for an offense so vaguely defined, for an act the criminality of which he has no possible means of measuring in advance, depending not at all upon his own intent to violate the law, but wholly upon the opinion of a jury, based on instructions by a court which is itself without guide or compass, and

> where all concerned, defendant, counsel, Government, court, and jury, may well be at cross-purposes, no one knowing what is just or what is reasonable, and all disagreeing as to the method by which what is just or reasonable may be, if indeed it can ever be, legally ascertained."

It cannot be denied that the actual effect and operation of the statute in suit is, as District Judge Woodrough declared in *United States* v. *Bernstein* (D. C. Neb., not yet reported), to leave the vital question of "the fairness of the price . . . to be determined, [not] by the processes of commerce operative at the time, but by the *ex post facto* inquiry of the jury."

Such a statute as the one at bar falls within the condemnation of a long line of authorities. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, *id.* 634; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 237-8; *United States* v. *Reese*, 92 U. S. 214; *Louisville & Nashville R. R. Co.* v. *Railroad Com.*, 19 Fed. 679, 691; *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876; *Tozer* v. *United States*, 52 Fed. 917, 919-20; *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735, 743; *Czarra* v. *Board of Medical Examiners*, 25 App. D. C. 443, 450; *United States* v. *Capital Traction Co.*, 34 App. D. C. 599; *Louisville & Nashville R. R. Co.* v. *Commonwealth*, 99 Ky. 132; *Commonwealth* v. *S. C. &c. St. R. R. Co.*, 181 Ky. 449, 469; *Ex parte Jackson*, 45 Ark. 158, 164; *Railroad* v. *People*, 77 Ill. 443.

In *Louisville & Nashville R. R. Co.* v. *Railroad Commission*, 19 Fed. 679, 691, the court of three judges said:

> "The complainant insists that the act is too indefinite to sustain a suit for the penalties therein imposed, the offenses for which said penalties are to be inflicted not being sufficiently defined. The

definition of the two principal of these offenses, is,—*First*, the taking of 'unjust and unreasonable compensation;' and, *secondly*, the making of 'unjust and unreasonable discriminations.' But what is unjust and unreasonable compensation, and unjust and unreasonable discrimination? And can an action, *quasi* criminal, be predicated thereon? It was expressly held to the contrary in the case of *Cowan* v. *East Tenn., V. & G. R. Co.*, decided a few years since, at Knoxville, (but not reported,) because, as the learned judge said, 'it would have to be left to a jury, upon the proof, to say whether the difference' in the rates 'was discrimination or not,' and that the same difference 'might in one instance be held a violation of the law and in another not,' thus making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act. 'This,' he said, 'I think cannot be done.' If this decision is authoritative, it is conclusive of this part of this case. We think the decision clearly right. Questions as to what is a reasonable time for the performance of a contract, or reasonable compensation for work and labor done by one man at the request of another without any stipulation as to the price to be paid, and other like cases, frequently arise in civil controversies. But the law furnishes, in all such cases, a *standard* of compensation for the guidance of the jury. Without such legal standard there could be no reasonable approximation to uniform results; the verdicts of juries would be as variant as their prejudices, and this could not be tolerated. To thus relegate the administration of the law to the unrestrained discretion of the jury; to thus authorize them to determine the *measure* of damages and then assess the amount to which a plaintiff may be entitled, would inevitably lead to inequalities and to injustice."

And in the cases of *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 876, and *Tozer* v. *United States*, 52 Fed. 917, 919-20, Mr. Justice Brewer twice ruled to the same effect.

The question was elaborately considered in the case

of *Louisville & Nashville R. R. Co. v. Commonwealth*, 99 Ky. 132, where the court wrote as follows:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.
>
> "If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and Federal Constitutions, we are not able to comprehend the force of our organic laws."

The undiminished force and persuasiveness of this reasoning was recently recognized by this court in *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 237-8, where Mr. Justice McKenna said:

> "Again, it is charged that the order expressed but a legislative principle, has the generality of such

principle without any criterion of application. The order requires the company to 'provide . . . upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.' What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer and if the railroad company ventures, however honestly, any resistance to a request or notice not deemed reasonable or to shipments not deemed normal it must exercise this right at the risk of a penalty of $5,000 a day against all of its responsible officers and agents. These considerations are very serious (*International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Collins* v. *Kentucky*, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions."

Under the statute involved in the cases at bar the menace is even greater than that commented upon in the preceding quotation. The ordinary business man is now permitted to sell necessaries solely at the risk of being condemned as a felon and sentenced to imprisonment for two years and fined $5000 in respect of every one of the scores of sales he makes and must make every day. Manifestly, the penalties threatened by this act operate *in terrorem* upon the mind of the plain man, even if they were not indeed so intended to operate in order to compel compliance with unwarranted demands of government officials determined to depress prices by any means. The validity of the penalty provisions of the statute is, therefore, quite doubtful. *Ex parte Young*, 209 U. S. 123, 147; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 337.

Nothing inconsistent with the foregoing views was decided by this court in *Waters-Pierce Oil Co.* v. *Texas*, 212

U. S. 86; *Nash* v. *United States*, 229 U. S. 373; *Miller* v. *Strahl*, 239 U. S. 426; *Fox* v. *Washington*, 236 U. S. 273, and *Omaechevarria* v. *Idaho*, 246 U. S. 343. This was expressly recognized in the *Waters-Pierce Co.* case, *supra*, where the court, after referring to rule laid down in the the cases of *Tozer* v. *United States*, 52 Fed. 917; *Railway Co.* v. *Dey*, 35 Fed. 866, and *Louisville and Nashville Railway* v. *Commonwealth*, 99 Ky. 132, (discussed above), carefully distinguished those cases from the one then before it in the following language (212 U. S. at p. 109):

> "But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

The *Nash* case, 229 U. S. 373, relied on by the Government, deals with the criminal provisions of the Sherman Anti-Trust Law, which, as construed by this court, prohibited undue restraints of trade in interstate commerce. While the language of the enactment there in question did not categorically set forth all the particular acts to which it applied, it did so in effect by reference to and adoption of the well-established common law rules governing restraints of trade. These defined the prohibited acts with sufficient precision to enable ordinary men to regulate their conduct so as to avoid violating the law. An individual who desired to be quite safe from prosecution under the Sherman Law had a clear course open to him—he need not monopolize or restrain interstate trade at all. If, nevertheless, he chose to embark upon a course of monopoly or restraint of trade, he had a long settled and well developed body of law to guide him. But in the cases at bar there is no common law rule for determining

the question. The crime created in the Lever Law is entirely novel. And there is, in addition, no safe course whatever open to dealers in necessaries. "If business is to go on, men . . . must sell their wares" (*International Harvester Co. v. Kentucky*, 234 U. S. 216, 223), but, notwithstanding this compelling necessity, the statute in question converts *every* sale at *any* price into a possible source of prosecution and conviction thereunder. Such an undefined new crime clearly offends against the principle long ago declared by this court through Mr. Chief Justice Waite in *United States v. Reese*, 92 U. S. 214, 220, as follows:

> "If the legislature undertakes to define by statute a *new* offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

In *Miller v. Strahl*, 239 U. S. 426, and *Fox v. Washington*, 236 U. S. 273, also relied upon by the Government, the standard of conduct imposed by the statutes in question was also rendered certain and clear by reference to well-recognized rules of the common law; and in the *Miller* case, moreover, the constitutional question here raised was not involved, since it was not a criminal proceeding.

Omaechevarria v. Idaho, 246 U. S. 343, involved the validity of a statute forbidding sheep to graze "upon any range usually occupied by any cattle grower," etc. It was challenged as void for indefiniteness. It appeared, however, that this law had been enacted over thirty years before; and, manifestly, a statute, which had in actual practical operation for so long a period been found by experience to be sufficiently certain, could not at this late day be set aside as too vague for practical administration

and enforcement. An indisputable practical construction demonstrated the contrary. Under the statute involved in the cases at bar, on the other hand, even the short experience since October 22, 1919, discloses that the recent amendment of the Lever Law has produced widespread confusion among the judges and consternation among businessmen, who find it impossible to conduct their affairs under this amendment of the law made in 1919 without running the risk of imprisonment at every turn. Indictments have been procured by United States Attorneys in almost every jurisdiction and practically at will. No businessman is safe; he cannot safely sell at the usual market price, or even at cost with any degree of safety, and the continued operation of the statute makes its meaning no clearer for the future.

II.

THE CLASSIFICATION CONTAINED IN SECTIONS 4 AND 26 OF THE LEVER ACT AS AMENDED VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION.

The fourth section of the Lever Act as amended October 22, 1919, contains two provisos which take out of the prohibitory provisions of the law certain classes of individuals and which read as follows:

> "*Provided*, That this section shall not apply to any farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist, with respect to the farm products produced or raised upon the land owned, leased, or cultivated by him: *Provided further*, That

> nothing in this Act shall be construed to forbid or make unlawful collective bargaining by any co-operative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them."

The twenty-sixth section of the act deals with persons engaged in interstate commerce, lays them under certain enumerated prohibitions in respect of storing, hoarding and destroying necessaries, etc., similar in character to the prohibitions contained in section 4, and then continues in part as follows:

> "*Provided*, That any storing or holding by any farmer, gardener, or other person of the products of any farm, garden, or other land cultivated by him shall not be deemed to be a storing or holding within the meaning of this Act: *Provided further*, That farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section."

Quite plainly it is the purpose of this statute to place agriculturists and combinations of agriculturists in a favored class and to free them from all the restraints laid upon others dealing likewise in necessaries. In other words, in an enactment whose professed purpose is to conserve food and other necessaries to the end of winning a war, the most important class of all—that which produces all that grows—is left entirely free and unregulated. Of what use is it to say to a baker that he shall not charge an unjust or unreasonable rate for his loaves of bread, if the farmer has already charged him a grossly excessive price for the wheat that must be used to make the bread? It is manifest that prices can never be fair and reasonable

for any finished product, no matter what manufacturers and middlemen may do, if the cost of the raw material is unduly large. It would seem, therefore, that the exceptions referred to are entirely inconsistent with the primary purpose of the law, tend to frustrate it, and are in fact merely arbitrary attempts to set up a favored class. The precise question has been so ruled by District Judge Anderson in the recent case of *United States* v. *Armstrong*, 265 Fed. 683, 691, *et seq.*, where he wrote as follows:

> "The Lever Act is entitled:
>
> 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.'
>
> "In the first section of the act, 'foods, feeds and fuel' are called necessaries, and the prohibitions are as to necessaries thus defined. By amended section 4 farmers, gardeners, horticulturists, vineyardists, planters, ranchmen, dairymen, stockmen, and other agriculturists—persons who produce foods and feeds—with respect to the products produced or raised upon land owned, leased, or cultivated by them, may willfully destroy such foods and feeds for the purpose of enhancing the price or restricting the supply thereof, may knowingly commit waste or willfully permit preventable deterioration of such foods and feeds in or in connection with their production, manufacture or distribution, may hoard such products, may monopolize or attempt to monopolize such products, may engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or may make any unjust or unreasonable rate or charge in handling or dealing in or with such products, and may conspire, combine, agree, or arrange with any other person to limit the facilities for producing, or to restrict the supply, or to restrict the distribution, or to prevent, limit, or lessen the

production in order to enhance the price, or exact excessive prices for such products, with impunity, while all other persons are to be punished as criminals for doing the same acts, including those who produce, supply, or distribute the other necessary, fuel. The section so provides notwithstanding the fact that the excepted and the included persons are all in the same general class; that is, they are all alike engaged in producing, handling, and distributing necessaries—foods, feeds, and fuel. The constitutional warrant for this legislation is found in the grant of power to Congress to declare war, to raise and support armies, and to provide and maintain a navy. Those who produce foods to feed the soldiers and sailors, those who produce feeds to feed the horses and mules required by the army, and those who produce fuel to transport the soldiers and propel the ships of the navy, are all alike helping to win the war, and are all alike in the same general class.

"The second proviso in amended section 4, that 'nothing in this act shall be construed to forbid or make unlawful collective bargaining by any cooperative association or other association of farmers, dairymen, gardeners, or other producers of farm products with respect to the farm products produced or raised by its members upon land owned, leased, or cultivated by them,' is as unwarranted as the one just considered. The indulgence to the excepted class is in respect to the farm products produced or raised upon land owned, leased, or cultivated by the members of it. But this does not differentiate the instant case from the *Connolly Case*, for there the exception was to apply to 'agricultural products or live stock while in the hands of the producer or raiser.' My conclusion is that the classification in amended section 4 is arbitrary and not natural or reasonable; that such section is repugnant to the 'due process' clause of the Fifth Amendment, and is therefore void. . . .

"Section 26 deals with persons carrying on or employed in commerce among the several states, in any article suitable for human food, fuel, or other

necessaries of life, and it prohibits the storing, acquiring, holding, or destroying of any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof in such commerce. The first proviso exempts farmers, gardeners, and other persons as to the products of land cultivated by them, and is objectionable for the same reasons given above in considering a similar exception in amended section 4.

"The second proviso, 'that farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section,' carves out an excepted class for which no reasonable basis can be seen. This proviso is not limited to the necessaries produced by the excepted class, but it applies to farmers, fruit growers, co-operative and other exchanges, or societies of a similar character, without reference to where or by whom the necessaries are produced. These persons are set apart as a favored class, and are given the privilege of storing, acquiring, holding, or destroying necessaries for the purpose of limiting the supply thereof to the public or affecting the market price thereof in interstate commerce, without any restraint whatever, while all other persons who commit such acts are to be punished as criminals. It is arbitrary legislation and cannot stand. Section 26 is therefore void."

The case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, to which District Judge Anderson refers in the foregoing extract from his opinion, is a direct authority in point. This court there had under review an Illinois anti-trust law which forbade combinations and conspiracies to prevent competition, fix prices or restrain production, but, nevertheless, attempted to make the following exception from the field of operation of the statute, namely, that—

> "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

This court held the enactment unconstitutional and void because of this attempt to create a favored class without justification or reason. Mr. Justice Harlan, speaking for the court, said (at pp. 563-4):

> "It may be observed that if combinations of capital, skill or acts, in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.
>
> "We conclude this part of the discussion by saying that to declare that some of the class en-

> gaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The *Connolly* case is plainly in point and constitutes a direct precedent against the validity of the statute herein involved. It is of unimpaired authority (see *International Harvester Co. v. Missouri*, 234 U. S. 199, 215), and it dealt with an act of the legislature entirely analogous in all substantial respects to that now before the court, despite the fact that there is some difference in phraseology between the statutes.

It is no justification for the classification attempted in the statute in question to say that excepting farmers, etc., tended to encourage production of agricultural products. These products were no more and no less necessary to the winning of the war than coal and thousands of other products not exempted. Moreover, the same contention was presented to the court in the *Connolly* case and emphatically rejected. If it could not be recognized there, it should certainly not be accepted in respect of an act passed in the exercise of the war power. If it be ever right to leave farmers free to combine against and to profiteer at the expense of their fellow countrymen, it certainly could not be right to leave them at liberty to

do so at the expense of the army and navy and of a citizenry sorely taxed and burdened by a great war.

It cannot be argued that the *Connolly* case is not applicable because it turned upon the equal protection of the law clause of the Fourteenth Amendment, while the cases at bar are concerned solely with the due process clause of the Fifth Amendment. The provision for the equal protection of the law in the Fourteenth Amendment no doubt emphasizes the necessity for proper classification in state legislation, but it does not create this requirement. The due process clause alone would be equally effective for this purpose. McGhee on Due Process of Law, pp. 60-64, 311; 2 Willoughby on the Constitution, pp. 873-4; *United States* v. *Armstrong*, 265 Fed. 683, 690; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24-5. Indeed, nothing could be deemed a more inherent requirement of due process of law than that the law shall "operate on all alike, and not subject the individual to an arbitary exercise of the powers of government" (*Giozza* v. *Tiernan*, 148 U. S. 657, 662). Where, however, some are freed of restrictions to which others in similar situation are subjected, that is nothing less than "an arbitrary exercise of the powers of government"; it is not a law but an edict, and due process of law has been plainly denied.

The unjust classification attempted in the Lever Act, therefore, renders the sections involved wholly invalid, for, of course, the court cannot nullify the provisos and thereby make the statute uniform in its application.

III.

THE ACT OF OCTOBER 22, 1919, IS VOID BECAUSE THERE IS NOT NOW ANY EXISTING WAR EMERGENCY TO SUSTAIN IT AS A PROPER EXERCISE OF THE WAR POWER OF CONGRESS.

The amendment to the Lever Law on October 22, 1919, is conceded by the Government to be sustainable only if it constitutes a proper exertion of the war power of Congress. It is well settled that an individual engaged in a business not subject to a public interest may sell to whom he pleases and at any price he can get. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 320; *People* v. *Budd*, 117 N. Y. 1, 15. It is only the existence of a present actual war emergency which warrants Congress in interfering with this right. As stated in the leading case of *Ex parte Milligan*, 4 Wall. 2, 127, "the necessity must be actual and present". See also 2 Willoughby on the Constitution, p. 1251; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 162-3; *Ruppert* v. *Caffey*, *id.* 264, 308; *Mitchell* v. *Harmony*, 13 How. 115, 135; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Milligan* v. *Hovey*, 3 Biss. 13; *In re Egan*, 5 Blatchf. 319; *McLaughlin* v. *Green*, 50 Miss. 453; *Johnson* v. *Jones*, 44 Ill. 142, 154; *Griffin* v. *Wilcox*, 21 Ind. 370; *Nance & Mays* v. *Brown*, 71 W. Va. 319, 324.

It is, therefore, material to inquire only whether any actual war emergency exists at present, nearly two years after the Armistice. It is, indeed, of no consequence that in August, 1917, when the original Food Control Law was passed, or even on October 22, 1919, when it was

amended, there was an actual war emergency confronting the Nation. "As necessity creates the rule, so it limits the duration" thereof (*Ex parte Milligan*, 4 Wall. 2, 127), and wartime legislation, depending, as it does, upon the existence of a present emergency, cannot be permitted to remain in force and effect beyond the time of emergency. For it must be obvious that any other rule would enable Congress, by merely refraining from the repeal of such enactments, indefinitely to prolong the interference of the Federal Government with individual and state rights, long after there had ceased to be any warrant therefor. Wartime legislation is, consequently, an excellent example of that species of legislation which, though constitutional when enacted, thereafter becomes invalid by mere efflux of time whenever its sustaining cause has disappeared. See *Johnson* v. *Gearlds*, 234 U. S. 422, 446; *Perrin* v. *United States*, 232 U. S. 478, 486; *Municipal Gas Co.* v. *Public Service Com.*, 225 N. Y. 89, 95-97; *Castle* v. *Mouse*, 91 Okla. 81, 206, 303. The nature and duration of the war power were aptly described by Mr. Justice McReynolds in the dissenting opinion in the recent case of *Rupert* v. *Caffey*, 251 U. S. 264, 308, as follows:

> "The power of Congress recognized in the *Hamilton Case*, and here relied upon must be inferred from others expressly granted and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities and only so long as the relationship continues. Whether these essentials existed when a measure was enacted or challenged, presents a question for the courts."

There is no war emergency now existing which warrants the continued existence and enforcement of this legislation affecting all private business in necessaries of every kind and description and interfering with the affairs of virtually every individual engaged in trade. Even the slight evidence of emergency which the court was able to adduce in disposing of the cases of *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 161-2, and *Ruppert* v. *Caffey*, *id.* 264, has disappeared, and now there is no war or wartime condition anywhere in the land, and all that remains is the fiction of a *de jure* state of war. The merchants on whose behalf this brief is submitted buy and sell coal. Perhaps no industry has been longer under war regulation than this, yet on March 19, 1920, the President issued an executive order, effective April 1, 1920, which discontinued this regulation and control, and which declared:

> "I have concluded that it is not expedient for me to exercise any such price fixing control so that on and after April 1st, 1920, no government maximum prices will be in force. There is at present no provision of the law for fixing new coal prices for peace time purposes, and unless and until such grave emergency shall arise, which in my judgment has a relation to the emergency purposes of the Lever Act, I would not feel justified in fixing coal prices with reference to future condition or production."

It must needs be patent to all, as it is in fact indisputable, that demobilization of the army and navy has been completely accomplished; that the United States has dismissed its various war boards for the control of the country's industries; that the "national security and defense" have long since ceased to require drastic war legislation.

and that the Nation has been fully restored to a peace basis. Nothing remains but a mere technical state of war which may continue indefinitely. The legislative power of Congress authorizes only such laws as are "necessary and proper" to carry into execution the delegated powers, and, under conditions as they now exist, no actual war necessity or emergency calls for or justifies the stringent provision contained in the act of October 22, 1919, which declares it to be a felony for an individual handling or dealing in necessaries to charge an unjust or unreasonable price.

The question here presented is plainly a judicial question. Otherwise Congress would be the sole judge of the extent of its war powers and could exercise them at will and as despotically as it pleased, and in time of peace as well as in war. Mr. Chief Justice Chase disposed of an analogous contention in *Hepburn v. Griswold*, 8 Wall. 603, 617, as follows:

> "It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited [*McCulloch v. Maryland*, 4 Wheat. 316], established for the determination of the question

whether legislative acts are constitutional or
constitutional."

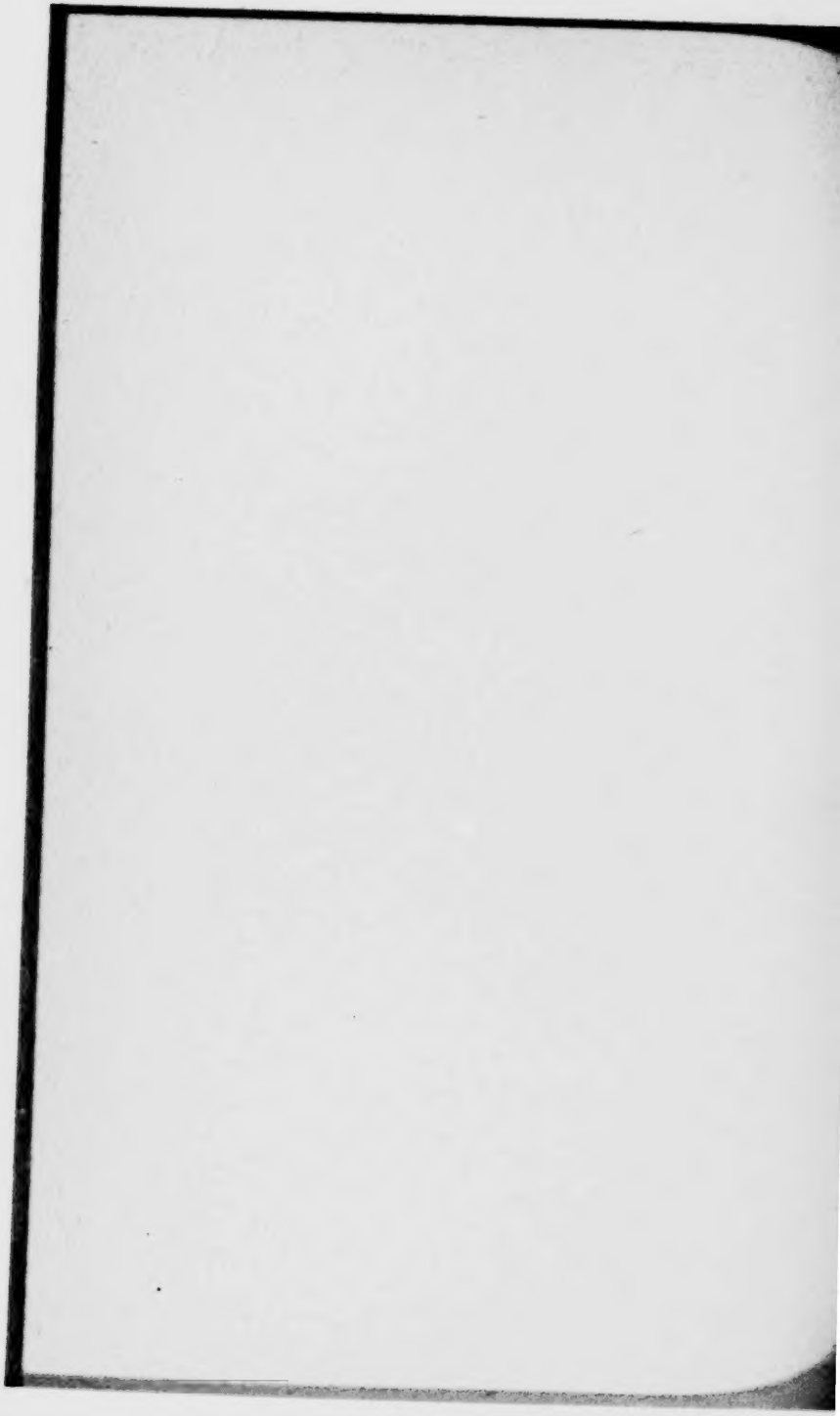
The justiciability of this question was, indeed, recogn
and assumed in the recent wartime prohibition ca
See also the sound reasoning in *Griesedieck Bros. B*
ery Co. v. *Moore*, 262 Fed. 582, 587-8.

Conclusion.

For the foregoing reasons, it is submitted that
act of Congress of August 10, 1917, as amended by
act of October 22, 1919 (40 Stat. 276, c. 53; 41 Stat.
c. 80), is unconstitutional and void in so far as it
tempts to provide that the making of "any unjust or
reasonable rate or charge in handling or dealing in
with any necessaries" shall constitute the commiss
of an infamous crime punishable by fine and impris
ment, and that the rulings of the lower courts in
above entitled cases were, therefore, right and sho
be affirmed by this court.

Washington, D. C., October 11, 1920.

William D. Guthrie,
Benjamin F. Spellman,
Bernard Hershkopf,
As *amici curiae*.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

NO. 324.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

L. COHEN GROCERY COMPANY.

In Error to the District Court of the United States,
Eastern District of Missouri.

JOHN A. MARSHALL,
D. N. STRAUP,
JOEL F. NIBLEY,
THOMAS MARIONEAUX,
As *Amici Curiae.*

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AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

NO. 324.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

L. COHEN GROCERY COMPANY.

In Error to the District Court of the United States, Eastern District of Missouri.

FOREWORD.

The counsel submitting this brief to this Honorable Court are engaged as counsel for the Utah-Idaho Sugar Company, a corporation, and a number of its directors, against whom indictments have been brought in the United States District Court in and for the District of Utah, charging them with violations of Section 4 of the Food Control and the District of Columbia Rents Act, as amended October 22, 1919.

Counsel for the parties in this cause having kindly consented thereto, we beg, with leave of the Court, to file a

brief herein as *amicus curiae*. This brief is therefore most respectfully presented to the Court in the hope that it may be of service in the construction and in the determination of the constitutionality of the law in question.

The indictment in this case in its first count, filed in the District Court of the United States, within and for the Eastern Judicial District of Missouri, at the September (1919) term thereof, charges in substance that the defendant in error, a corporation doing business in the City of St. Louis, Missouri, was, on or about the 3d day of December, 1919, a dealer in sugar and other necessaries, and at, etc., in, etc., did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar, in that the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased or cultivated by it, did demand of and exact and collect from and of one B. Heligman * * * the sum of $10.07 as and for the purchase price of about fifty pounds of granulated sugar, then and there purchased by the said B. Heligman from the said * * * Grocery Company, which said purchase price so demanded, exacted and collected for the said granulated sugar was and constituted an unjust and unreasonable rate and charge as it then and there well knew.

In the second count it is alleged that on or about the 4th day of December, 1919, at, etc., the said defendant,

not then and there being a farmer, gardener, etc., but being a dealer in the necessary as aforesaid, did wilfully and feloniously demand of and exact and collect from and of one B. Heligman the sum of $19.50 as the purchase price of one bag of granulated sugar, containing approximately one hundred pounds, then and there purchased by said Heligman from said defendant, and that said purchase price was and constituted an unjust and unreasonable rate and charge, as the said defendant then and there well knew.

The defendant interposed a demurrer to both counts of the indictment. The grounds of the demurrer in substance are that the indictment is not sufficiently explicit to advise the defendant "of what it will be required to meet at the trial," and that the allegations of fact are insufficient to protect the defendant from a subsequent indictment for the same offense.

It is also averred in the demurrer that on October 22, 1919, when the penal clause, on which the counts are based, was enacted, the necessity for such enactment had passed, because of the actual cessation of military and naval operations by the United States, and that therefore the indictment was and is an invasion of the rights of the States; and that the section of the amended statute upon which the counts are based violates the sixth amendment to the Constitution, "in that it affords a person no standard or criterion by which he can or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard, or criterion in conformity to which an indictment based upon the sec-

tion will, or can advise one, accused under the section, of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances."

The demurrer was sustained by the Court in the following memorandum of decision:

> The defendant, a corporation under the laws of the State of Missouri, stands indicted in this court in two counts under the amendment of October 22, 1919, of the act of August 10, 1917. To this indictment, and to both of the counts thereof, defendant demurs for that both the indictment, which follows the language of the amendment, supra, and the amendment itself, are insufficient to inform it of the nature and cause of the accusation against it; and, therefore, that both such indictment and the amendment itself, are violative of the sixth amendment of the Constitution of the United States.
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> The language of the statute, which attempts to create the crime charged against the defendant, so far as that language is pertinent to the specific charge against this defendant, reads thus:
>
> "That it is hereby unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding five thousand dollars and be imprisoned for not more than two years or both." (Sec. 2, Chap. 80, Stat. 1919, amendment of October, 1919, to the Lever Act.)

Following the language of the above statute the indictment charges that defendant "did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar;" and thereupon the indictment proceeds to aver the facts of the alleged sale of sugar, in that it sets forth the date of the purchase, the name of the purchaser, to whom said sugar was sold by defendant, the amount of sugar sold, and the price charged such purchaser therefor, and concludes by averring "that said purchase price so demanded, exacted and collected for the said granulated sugar, by the said L. Cohen Grocer Company from the said B. Heligman, was and constituted an unjust and unreasonable rate and charge, as it, the said L. Cohen Grocer Company then and there well knew."

Shortly before this, in a trial in this court upon a similar indictment against this defendant, at the close of the case, and upon a demurrer *ore tenus* bottomed upon the alleged insufficiency of the evidence to convict, I took occasion in an oral charge to say to the jury this:

"The act under which this prosecution is being had was approved on the 22d day of October, 1919, more than eleven months after the signing of the armistice. It is, of course, fundamental, gentlemen, that the constitutional validity of this act depends wholly upon whether, at the time it was passed and approved, a state of war existed between the United States of America and the Imperial German Government. Clearly, in a time of peace, a statute like this could not stand under the Constitution of the United States for a single minute.

"The Federal Constitution is not a limitation upon the powers of Congress, but it is a grant of powers to Congress, and beyond the limits of that grant neither Congress nor any other co-ordinate branch of the Government had a right to go. Con-

gress has no power to do anything unless power to act, either expressly or impliedly, is conferred by the terms of the organic law itself.

"So, in times of peace, the power to pass a statute like this is to be determined by the question whether the statute falls within the domain of interstate commerce, or within the domain of internal revenue. It must be within the domain of one or the other, or Congress has no power to invade the State's rights and pass it. Very clearly, this statute is not a manifestation of the power of legislation on matters of internal revenue. Just as clearly, in my opinion, or almost as clearly, at least, it is not a matter within the domain of interstate commerce. This is so because this act deals with the commodities that are affected by it after interstate commerce has wholly ceased to deal with these commodities; after, in other words, interstate commerce has acted and the commodity has come to rest in the State—in this case, in the State of Missouri.

"But since the Supreme Court of the United States in the liquor case has seemingly ruled that a legal state of war, or a legal fiction of war, exists and will continue to exist until the ratification of the treaty of peace with the German Republic, and until the proclamation of that fact by the President, although the Imperial German Government with which the war was declared, has ceased to be, I am, therefore, bound by this ruling. Consequently, whatever mental reservations I may hold personally, I take it that so far as that particular phase of the Constitution is concerned, that the act in question is valid.

"But, a most serious question is met after the constitutionality of the statute is settled, upon the point of its invasion of State's rights, the point that I have just been talking about. That question is, whether the act is not too vague, indefinite, and uncertain to be enforced by the courts, and whether

by reason of such vagueness, indefiniteness, and uncertainty it does not, in effect delegate the legislative power which is vested in Congress alone to the courts and to the juries of this country; and, also, whether this act by its existing terms fixes any definite or certain rule by which human conduct can be uniformly governed. In other words, the question arises—a serious question arises. Does it inform the accused of the nature and cause of the accusation against him, as the sixth amendment to the Constitution of the United States specifically and certainly requires? I can not be brought to think, so gentlemen.

"Briefly: This statute makes it a felony for any person—which, I take it, includes a corporation as well—wilfully to make any unjust or unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might say that a charge of twenty-five cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen can not at any given moment know whether he is a felon or a patriot.

"In the presence of the existing rapacity and greed of the profiteer, I confess it has been difficult for me to approach this question in a judicial frame of mind. It is to me a matter of most sincere regret that I find it my duty to say, so far as the application of this law to the fact presented in this identical case is concerned, that it is invalid, for the reason I have stated. It is regrettable that a law which was intended to be as beneficent as this law is intended to be, and which was intended and designed to remedy a most outrageous

and crying evil, should be found to fall short by reason of constitutional difficulties of the end sought to be attained. There never was a time when a curb of human greed and rapacity was so urgently demanded as it is demanded now, and I repeat, that the abhorrence I feel of the selfish hoggishness of the profiteer is such that I can scarcely deal with the question with the amount of judicial aplomb with which I ought to deal with it.

"But, in my opinion, gentlemen, these considerations do not warrant ruthless over-riding of the rights of the citizen to have stated in a criminal statute the certain and definite rights which hedge him about as a citizen, and the certain and definite definition by which he, or his counsel, can ascertain whether or not he is guilty of a felony.

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. * * *

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

To these views thus orally expressed I am constrained to adhere, notwithstanding the fact that my attentaion has been called to certain cases which, it is urged, give color to the contention that statutes equally as vague, uncertain, and indefinite as that here involved have nevertheless been upheld by the Supreme Court of the United States as constitutionally valid. These cases are Standard Oil Company v. United States, 221 U. S. 106; Nash

v. U. S., 229 U. S. 273; and Waters-Pierce Oil Company v. Texas, 212 U. S. 86.

The case of Standard Oil Co. v. United States, supra, was a civil proceeding by injunction and for dissolution into its constituent elements for monopolization and restraint of trade, and it was not a criminal proceeding, such as is this at bar. The statute upheld in the Standard Oil case upon an attack analogous to this (or so far analogous as a civil case may be to a criminal one) were Sections 1 and 2 of the so-called Sherman Anti-Trust Act. Sections 1 and 2, act of July 2, 1890, Chap. 647, 26, Stat., 209) these sections denounced and declared unlawful all monopolies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common law definitions and crimes of engrossing and monopolizing. Since the above case was not a criminal one but a civil action, no occasion arose therein for any reference to or consideration by either court or counsel of the provisions of the sixth amendment to the Federal Constitution, and none such was made.

Neither was the case of Waters-Pierce Oil Company v. Texas, supra, a criminal case but a civil case in the nature of quo warranto. The trial thereof in the Texas State courts was had under certain statutes of that State, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the sixth amendment but that phrase of the fourteenth amendment touching due process of law was alone involved. (Waters-Pierce Oil Co. v. Texas, supra, 1 c. 111.) While the attack involved the alleged vagueness and indefiniteness of the Texas statutes these statutes clearly defined a monopoly. (Water-Pierce Oil Co. v. Texas, supra, 1 c. 99.) For the rest, what is said touching the Standard Oil case, supra, applies also to the Waters-Pierce case.

The case of Nash v. United States, supra, was, however, a criminal case under Sections 1 and 2, supra, of the Sherman Anti-Trust Act. The indictment in the Nash case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspiracy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and therefore fell out of the case.

In the course of the opinion in the Nash case it was pointed out that no overt act, nothing, indeed, beyond the bare conspiracy itself, need be either charged or proven; that the Sherman Anti-Trust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies and contracts in restraint of trade. (3 Coke Inst. 181, Chap. 85; 1 Hawkins P. C., Chap. 29, 5 and 6 Edw. VI, Chap. 14; Standard Oil Co. v. United States, 221 U. S. 1 c. 51.) Just here the query may logically arise as to where at common law is there any crime defined or denounced as "making an unjust or unreasonable charge in dealing in any necessary?"

After the Nash case was ruled, the Supreme Court of the United States again had occasion to refer to it and distinguish it in a case arising under the constitution and laws of the State of Kentucky. (International Harvester Co. vs. Kentucky, 234 U. S. 216.) Plaintiff in error in the above case was convicted and fined in the courts

of the State of Kentucky under certain statutes passed pursuant to provisions of the Kentucky constitution, which permitted the legislature to enact such laws as might be necessary to prevent all trusts "from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." The statutes passed by the legislature of Kentucky made it lawful to enter into any combination for the purpose of controlling prices, "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." The Supreme Court of the United States held that neither the constitution of Kentucky nor the statutes above referred to, and passed pursuant to the constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. (International Harvester Co. vs. Kentucky, 234 U. S. 223.)

Distinguishing the Nash case from what was said in the International Harvester case, the Supreme Court said:

"We regard this decision as consistent with Nash v. United States (229 U. S. 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not the imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar prac-

tice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S. 223.)

While no reference was made by the Supreme Court in the above excerpt to the fact that common law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-trust Act) were being dealt with in the Nash case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, brings this case into that class represented by the Kentucky Statutes, rather than the common-law class represented by the Nash case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky case. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable which may be entertained by a jury personally embarrassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is, therefore, no better than lynch law.

The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that

no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act, shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which inhere in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefiniteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

For these reasons, and for others which I might add if leisure allowed, I think the demurrer to the indictment ought to be sustained.

C. B. Faris,

District Judge.

We take it that the demurrer, upon the ground that the indictment does not state facts sufficient to constitute an offense, raises the question of the constitutionality of the law and of the construction thereof.

The ultimate question, of course, is whether the indictment states facts sufficient to constitute a public offense. It may fail in such statement because the section under consideration is unconstitutional, or because when properly interpreted it is necessary in a prosecution under it, to state certain facts regarding which the indictment is silent.

Our contention is that the language of Section 4, upon which both counts of this indictment are based, does not relate to the *sale* of necessaries. The indictment proceeds upon the hypothesis that the following language, namely: "It is hereby made unlawful for any person to • • • engage in any discriminatory or unfair, or any deceptive, wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries," requires a dealer to sell at a just and reasonable price; but this is not the language of the act. Price is not mentioned. What is forbidden is an unjust or unreasonable rate or charge in handling or dealing in or with necessaries. It must be conceded that if what is here referred to is the price demanded upon a sale of necessaries, Congress has taken a most peculiar method of expressing its intention. But by this language we think that Congress did not have in mind the sale of necessaries. There are rates and charges made in handling or dealing in or with necessaries that

do not relate to the price paid upon a sale thereof, as for example, storage charges, commissions, interest upon advances made by factors to their principals, insurance, cartage, boxing, wrapping or sacking, and various other rates and charges for services may be mentioned.

One who has it in mind to prevent or to forbid a seller's disposing of his wares at an excessive or unreasonable *price* does not usually omit all mention of the words "sale" or "price." A sale is defined to be a transfer of property for a consideration in money. The consideration is invariably referred to as the price.

It is evident that in the passage of the "Act to enable the President to carry out the price guaranties made to purchasers of wheat of the crops of 1918 and 1919, and to protect the United States against undue enhancement of its liabilities thereunder,"—Act of March 4, 1919, Chapter 125, 40 Stat. L. 1348,—Congress did not regard the words "discriminatory or deceptive practice or device, or any unjust or unreasonable rate or charge"—which is the language in substance of Section 4—as definitive of the transaction commonly called a sale, for after making it "unlawful for any licensee to engage in any unfairly discriminatory or deceptive practice or device, or to make any unjust or unreasonable rate, commission or charge,"—the words *"or to exact an unreasonable profit or price"* are added in Section 5 in regulating the conduct of persons handling or dealing in or with wheat, wheat flour, bran and shorts.

We quote from Section 5 of the Act:

"It shall be unlawful for any licensee to engage

in any unfairly discriminatory or deceptive practice or device, or to make any unjust or unreasonable rate, commission, or charge, or to exact an unreasonable profit or price, in handling or dealing in or with wheat, wheat flour, bran, and shorts. Whenever the President shall find that any practice, device, rate, commission, charge, profit, or price of any licensee is unfairly discriminatory, deceptive, unjust or unreasonable, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price. The President may, in lieu of any such unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price, find what is a fair, just, or reasonable practice, device, rate, commission, charge, profit, or price, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been suspended, or revoked after opportunity to be heard has been afforded him, intentionally and knowingly engages in or carries on any business for which a license is required under this section, or intentionally and wilfully fails or refuses to discontinue any unfairly discriminatory, deceptive, unjust, or unreasonable practice, device, rate, commission, charge, profit, or price, in accordance with the requirement of an order issued under this section, or intentionally and wilfully violates any regulation prescribed under this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine not exceeding $1,000." (40 Stat. L. 1348.)

It is certain that in the enactment of Section 5 of the Act of 1919, Congress did not consider the words "rate or charge" sufficient to describe the price taken upon a sale of wheat, wheat flour, bran, or shorts; and there is no reason for supposing that it considered these words as defining a sale when it enacted Section 4 of the Act of 1917.

In the construction of a particular statute or in the interpretation of any of its provisions all acts relating to the same subject or having the same general purposes in view should be read in connection with it.

Woods v. Carl, 75 Ark. 328, 87 S. W. 621. (Affirmed in 203 U. S. 358, 51 L. Ed. 219);

See also 36 Cyc. 1147-8.

The meaning of doubtful words in one statute may be determined by reference to another in which the same words have been used in a more obvious sense.

36 Cyc., supra;

Eckerson v. Des Moines, 115 N. W. 177, 137 Ia. 452.

The construction of a statute by the legislature as indicated by the language of subsequent enactments is entitled to great weight.

36 Cyc. 1142.

Referring again to Section 4 of the Lever Act, we think it is evident for another reason that the words "rate or charge" there used do not have reference to the "price" or "profit" exacted upon the sale of necessaries. There is a statute of the United States (Section 37, 35

Stat. 1096) which makes it unlawful for any person to conspire or agree with another to violate any law of the United States. Section 4 of the Lever Act, after making it unlawful to make any unreasonable *rate* or *charge* in handling or dealing in necessaries, provides that it shall be unlawful for any person to conspire, combine, agree or arrange with any other person to • • • "exact excessive prices for any necessaries." Now it was wholly unnecessary to add this provision to Section 4, if to make an unjust or unreasonable rate or charge forbade one to exact excessive prices for necessaries. The law-maker is always presumed to know the existent law.

36 Cyc. 1136, 1145;
Ensley v. State, 88 N. E. 62.

If the inhibition against making any unjust or unreasonable *rate* or *charge* was an inhibition against the exaction of excessive *prices* for necessaries, then by virtue of the law as it already existed any person would be guilty of conspiracy under Section 37 who conspired, combined or agreed with any other person "to exact excessive *prices* for any necessaries;" but Congress, not regarding the inhibition against making any unjust or unreasonable rate or charge as forbidding one to "exact an unreasonable price in handling or dealing in or with any necessaries," appreciated that a conspiracy, combination, agreement or arrangement between several to exact excessive prices for necessaries would not be punishable under Section 37, and for that reason made pro-

vision for such a conspiracy in Section 4 of the Lever Act.

When we come to examine the conspiracy clauses of Section 4 we observe that conspiracies, combinations, etc., there prohibited, do not in express terms *relate to any of the acts declared unlawful in the preceding portion of the section.* It was very proper not to include in the conspiracy portion of this section any of the acts forbidden by the language preceding the word "necessaries" in line 11 because Section 37, 35 Stat. 1096, of necessity make it criminal for any person to conspire, combine, agree or arrange with any other person to commit any of the acts thus forbidden. Therefore, we find Congress very properly making special provision for conspiracies, combinations and agreements to do things not expressly forbidden anywhere in the first eleven lines of Section 4.

Let us divide Section 4 into two parts, the part which precedes the words "*conspire, combine, agree or arrange with any other person,*" and the part which includes and follows these words. Now, the first part declares certain acts unlawful. Then the second part makes it unlawful to conspire, combine, agree or arrange with any other person to accomplish certain *other acts*—acts not already prohibited.

In this second portion of the section *none of the acts already prohibited above is included.* None of them is included because conspiring, combining, agreeing or arranging with any other person to commit any of those acts was already prohibited by Section 37, 35 Stat. 1096, the general conspiracy statute, for it is a conspiracy un-

der that statute to agree with any other person to violate any law of the United States. The very circumstance that in what we have called the second part of Section 4 it is made unlawful *to conspire with any other person to exact excessive prices for any necessaries*, is proof of the fact that *exacting excessive prices for any necessaries is not an act prohibited* in what we have called the first part of Section 4, the part containing the words "rate or charge."

Let us combine the two provisions of the law in order to make our meaning clearer. Revised Statute, Section 5440, amended, May 17, 1879, c. 8, 21 Stat. 4, March 4, 1909, c. 321, Section 37, 35 Stat. 1096, provides as follows:

> "If two or more persons conspire either *to commit any offense against the United States* or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Now, on August 10, 1917, Congress enacted Section 4 of the Lever Act, as follows:

> "Section 4. • • •
>
> It is hereby made unlawful for any person wilfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or wilfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in Section 6 of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; *to engage in any dis-*

criminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. • • •"

Now, we submit, that to conspire, combine, agree or arrange with any other person to do any of the acts above enumerated, would be punishable under Section 37; hence if "any unjust or unreasonable rate or charge," the language of Section 4, is comprehensive enough to include the exaction of any excessive or unjust or unreasonable price upon the sale of necessaries, then Section 37 makes it criminal to conspire, combine, agree or arrange with any other person to exact excessive prices for the same.

Nothing more needed to be enacted to make such an act criminal. If, therefore, we find that the law maker does add additional language to Section 4, specifically making it criminal to conspire, combine or agree with any other person to exact excessive prices for necessaries, then we insist that no other rational conclusion is admissible, except that in the opinion of the law maker he had not until he had added these additional words to Section 4, made such conduct criminal. It follows, therefore, that the words in Section 4, "it is hereby made unlawful for any person wilfully to engage in any discriminatory or unfair or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries," have no reference to the price exacted or demanded upon the sale of necessaries.

If we are correct in this contention it follows that the

indictment alleges an act which the statute does not forbid, and that the demurrer was therefore properly sustained upon the ground that the indictment failed to state facts sufficient to constitute an offense.

We do not contend that the Lever Act does not in terms forbid the sale of necessaries at an excessive price. Section 5 of the original act reads as follows:

> "That from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining, or distribution of any necessaries, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on any such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessaries as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for the issuance of licenses and requirements for systems of accounts and auditing of accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation, and the entry and inspection by the President's duly authorized agents of the places of business of licensees. Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable, or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission,

profits, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, non-discriminatory and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or wilfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirements of an order issued under this section, or any regulation prescribed under this section, shall, upon conviction thereof, be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or both: *Provided*, That this section shall not apply to any farmer, gardener, co-operative association of farmers or gardeners, including livestock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to the retail business actually conducted by him, nor to any common carrier, nor shall anything in this section be construed to authorize the fixing or imposition of a duty or tax upon any article imported into or exported from the United States, or any State, Territory, or the District of Columbia: *Provided further*, That for the purposes of this Act, a retailer shall be deemed to be a person, co-partnership, firm, corporation, or association not engaging in the wholesale business whose gross sales do not exceed $100,000 per annum."

The first sentence in Section 5 forbids any person to engage in or carry on the business of importation, manufacture, storage, mining, or distribution of any necessaries, without a license from the President.

The second sentence provides for the issuance of licenses by the President, for regulations with respect thereto, for systems of account by licensees, for reports, and for the entry and inspection of the places of business of licensees by the President's authorized agents.

The third sentence provides that whenever the President shall find any *storage charge, commission, profit or practice* of any licensee is unjust or unreasonable, or discriminatory or unfair or wasteful, the licensee shall upon demand of the President discontinue such *storage charge, commission, profit or practice.*

The next sentence provides that the President may find and declare what is a just, reasonable, non-discriminatory and fair storage charge, commission and practice, and in any proceeding brought in any court such finding of the President shall be prima facie evidence.

It is next provided that any person who, without a license, carries on any business for which a license is required under the section, or wilfully fails or refuses to discontinue any discriminatory and unfair storage charge, commission, profit or practice which has been forbidden as unjust or unreasonable, shall be punished by a fine or imprisonment or both.

Our contention is that in order to ascertain the intention of Congress it is necessary to construe Sections 4 and 5 together. We respectfully submit that what the

President is authorized to inquire into, and condemn and regulate, under the provisions of Section 5, is not the price at which his licensees *sell* necessaries. Neither sale nor price is anywhere mentioned in this section, and we cannot help but regard the omission of all reference to sale or price as conclusively indicating that the price exacted upon a sale of necessaries was not in the mind of the writer of Section 5. Notwithstanding the great flexibility of the English language a sale is an act, and the price exacted upon the sale is a thing so familiar, and these words are so common, that it is seldom indeed that in speech or writing we find a sale described without the use of the word "sale" or "price."

If in the enactment of Section 5 of the Lever Act of August 10, 1917, the words used in the third paragraph include the exaction of an excessive price for necessaries, we ask again, why was it that Congress did not deem these words sufficient in the enactment of Section 5 of the Act of March 4, 1919? Dealing with the same subject there Congress declared:

> "Whenever the President shall find that any practice, device, *rate*, commission, *charge*, profit *or price* of any licensee is unfair or discriminatory, deceptive, unjust or unreasonable, and shall order such licensee * * * to discontinue the same, * * * such licensee shall * * * discontinue such unfairly discriminatory deceptive, unjust or unreasonable practice, device, *rate*, commission, *charge*, profit or *price*."
>
> Section 5, 40 Stat. L. 1350.

Section 5 of the Lever Act evidently contemplates the licensing of all persons handling or dealing in or with any necessaries, except retailers and certain other persons mentioned in the proviso. We insist that it would be a rather curious conclusion to suppose that Section 4 was intended to prohibit the exaction of excessive prices for necessaries upon a sale thereof by *any* person handling or dealing in or with the same, *including retail dealers;* and that Section 5 contemplates that all persons, except *retail dealers*, should be forbidden to engage in the importation, manufacture, storage, mining or *distribution* of necessaries without a license from the President. It seems to us a much more rational construction to say that Section 5 is co-extensive with Section 4, in that *all persons* who handle or deal in necessaries must submit to have their conduct regulated by the President or his authorized agents in the respects stated in Section 5, and that retail dealers are excluded by the provisions of Section 5, because their business consists almost altogether in *selling* commodities and the fixing of the prices at which necessary commodities may be sold is provided for by Section 25. We are forbidden to suppose retail dealers to be included in Section 4, not only because, as we think we have already shown, the language of Section 4 does not embrace sales, but because to include retail dealers in necessaries, in respect to sales made by them, in the provisions of Section 4, when they are clearly and specifically excepted from the provisions of Section 5, would produce this result: That no person engaged in the importation, manufacture, storage, mining or *distribution*

of any necessaries, acting with the license of the President, would be punishable for any unjust or unreasonable or unfair price exacted upon a sale of any necessary, unless his act was in violation of an order of the President issued pursuant to the provisions of Section 5; whereas any retail dealer would be punishable (assuming the constitutionality of the law), for any price taken by him which a jury might deem unjust, unreasonable or unfair; so that some would be punished only when they had acted in defiance of a Presidential order condemning their practices or prices, and some would be punished although entirely innocent of any such disobedience, and all might be selling the same article at the same price! This conclusion necessarily follows, unless it is to be held that the licensees of the President may be punished for making unreasonable rates or charges, although such rates or charges have not been investigated or condemned by the President or the Federal Trade Commission, or any other agency of the President. But such a holding we insist is forbidden by the maxim: *Expressio unius est exclusio alterius.* It is not a sensible construction of the law, we insist, to say that the dealer is punishable for making rates or charges which have not been condemned, when the law expressly declares that he is punishable for making rates and charges which have been investigated by hearing evidence, and which have been condemned after the hearing, and of which hearing, evidence and condemnation the dealer has been advised.

It is not necessary to contend that such a discrimination would be unconstitutional. We think it is suffi-

cient to contend that such a discrimination would be unreasonable, and because it would be unreasonable we must conclude that such discrimination was not intended by the law maker. We are confident that Congress never intended to protect all citizens from punishment on account of the prices exacted by them in handling or dealing in necessaries, as long as they complied with the orders of the Executive Department promulgated after an inquiry and determination of what would be reasonable, and subject other citizens to the hazard of determining upon their own responsibility what would be reasonable and just, and punishing them without any admonition from the State, except admonition from a jury by a verdict of guilty requiring fine or imprisonment.

Section 5 clearly indicates that in the opinion of Congress a storage charge, commission, profit or practice of a person engaged in importation, manufacture, storage, mining or distribution of necessaries might be made, taken or indulged in without any intention upon the part of the citizen to be unjust, unreasonable, discriminatory or unfair, and therefore it was wisely provided that he should not be punished for his conduct in respect to these matters until it had first been examined into by the President, and by him found to be unjust or unreasonable, and the citizen admonished to discontinue it. Now, is it to be supposed that Congress thought that retail dealers were so wise as to need no such protection and warning, and that they would be able to tell in all cases whether any storage charge, commission, profit or practice on their part was just or reasonable, and be so easily able

to avoid it as that it was just that they should be punished without warning whenever their conduct should meet with the condemnation of a jury? If this was supposed to be fair to the retail dealer engaged in the distribution of necessaries, why was not it supposed to be fair as to the licensees of the President engaged in the "importation, manufacture, storage, mining and distribution" of necessaries? According to the contention of the Government the retail dealer in necessaries is excluded from all the protection afforded by the provisions of Section 5, but is exposed to all the dangers supposed to be encountered by those who handle or deal in necessaries by reason of the language of Section 4.

Our contention is that the retail dealer, *in selling necessaries*, is not within the language of Section 4. It results from our construction that no one is punishable for selling at an unjust or unreasonable price, if we assume that Section 5 enables the President to fix prices, unless he has violated an Executive order made pursuant to the provisions of said section.

Rate or charge commonly refers to compensation for services rendered. We speak of the rates or charges of a telephone or telegraph or railroad company for the services they render. We speak of the "price," not the "rate" or "charge" at which goods are sold.

The case of Barnard v. Morton, 1 Curt. U. S. 404, illustrates the meaning of the word "charge." We quote the following from the language of the Court:

> "Among the items denominated *charges* in the invoices are the expenses of carting the bags. It

is not denied in the protest, nor is there any ground to deny, that this is properly denominated one of the *charges*, and is to be added to the market value of the salt. If so, it would be strange if the expense of the sacks themselves were to be excluded. Take the definition of the word *charges* given by one of the witnesses—the expenses of getting the article on shipboard; if the cartage of the sacks comes into the *charges*, it must be because the sacks are a component part of the article bag salt; and if so, the cost of the sacks is one of the costs of that article."

"*Charges* are expenses incurred in relation to a transaction or suit. The word 'charges' in an agreement has been held not to include commissions or other compensation."

Green v. Jones, 78 N. C. 268.

"Charges in mercantile usage include only real expenses."

Alexander v. Morris, 3 Call (Va.) 99.

We concede, of course, that charge may refer to price. It may refer to the price for goods supplied, as well as a compensation demanded for services rendered, but we insist that it cannot be said that in Section 4 the words "rate or charge" necessarily refer to the price for goods supplied. If these words necessarily had such meaning it is certain that Congress would not in Section 5 of the Act of March, 1919, have followed the words "rate or charge" by the words "excessive price or profit," as we have heretofore pointed out.

This Court has said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States

v. Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States v. Lacher, 134 U. S. 624, 628."

United States v. Brewer, 139 U. S. 278-288;

See also Lamborn et al. v. McAvoy et al., 265 Fed.

There would, of course, be no room to contend that the words "rate or charge" do not have reference to the price taken for goods supplied, if, by such construction, the section would be rendered nugatory, but such construction does not render the section nugatory. In mercantile usage there are numerous rates and charges distinct from the price demanded upon a sale, upon which the language of Section 4 may properly operate.

The persons forbidden to impose unjust rates and charges are those who handle or deal in necessaries. Merchandise brokers, commission merchants, wholesalers, jobbers, common carriers—all impose "rates" and "charges" in handling and dealing in goods, which "load" or "burden" the price of the commodity finally to the retailer and ultimate consumer.

In East Tennessee etc. Railroad Co. v. Hunt, 15 Lea (Tenn.) 261, the Court construed the term "charges" as used in a bill of lading not to include demurrage, saying that it was plainly confined by the terms of the instrument to cooperage and repairs.

It has been held that Section 4 as originally enacted, was defective in lacking a sanction for the acts which it prohibits.

Mossew v. United States, United States Circuit Court of Appeals of New York, May 19, 1920.

At first proposing it must strike us all as singular that Congress should recite, as it does in Section 1 of the law under consideration, that "by reason of the existence of a state of war it is essential to the National security and defense, and for the successful prosecution of the war, and the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution," etc., and then with that important object in view forbid certain things to be done, *but provide no penalty for the doing of them.*

It is true that Section 4 itself (as originally enacted) contains no express sanction for the acts prohibited, but **it is not conceivable that Congress intended that violators of the provisions of this section should go unpunished.**

It is certain that by Section 5 and Section 25 express provision is made for the punishment of those persons who are guilty of making any storage charge, commission or profit, or of any practice which has been found and declared to be unjust or unreasonable or discriminatory or unfair or wasteful (Section 5), or who "shall with knowledge that the prices of any • • • commodity have been fixed, • • • demand or receive a higher price." (Section 25, 40 Stat. 284.)

We insist, therefore, that the amendment to Section 4, made October 22, 1919, prescribing a penalty of fine or imprisonment for the violation of any of the provisions of Section 4, leaves the law in its original state in respect

to the acts necessary to be done to constitute a violation thereof.

By the terms of Section 1, coke and coal are obviously to be considered, within the meaning of the Act, as necessaries. If the contention of the Government is correct, then Section 4 requires the sale of coke and coal at just and reasonable prices, and not at prices determined by the President or any agency of the Government, but at prices determined by a jury after the sale is made. But if this be the true construction of the law, why did Congress in Section 25 thereof authorize the President whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold, and declare that "said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission?"

We submit, therefore, that the substance of the law is as follows:

> "Sec. 4. It is hereby made unlawful for any person * * * to engage in any discriminatory or unfair, or any deceptive or wasteful practice or device, or to make any unjust or any unreasonable rate or charge in handling or dealing in or with any necessaries. * * *"
>
> "Section 5. Whenever the President shall find that any storage charge, commission, profit or practice of any licensee is unjust or unreasonable or discriminatory and unfair, or wasteful, and shall order such licensee * * * to discontinue such unjust, unreasonable and unfair storage charge, commission, profits or practice, * * * any person who * * * wilfully fails or re-

fuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit or practice in accordance with the requirement of an order issued under this section * * * shall, upon conviction thereof, be punished by a fine not exceeding $5,000 or by imprisonment for not more than two years, or both. * * *"

"Section 25. The President * * * is hereby authorized and empowered whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke wherever and whenever sold. * * * Said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission. * * *"

Section 25 further provides:

"Having completed its inquiry respecting *any commodity in any locality*, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior

to the establishment and publication of maximum prices by the commission.

Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than $5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense."

So we observe that Congress has dealt specifically with price fixing, and even if we shall conclude that Section 4 regulates prices and provides for the punishment of unjust or unreasonable prices, the general rule is applicable that special provisions of the statute must control general provisions, and under this rule *punishment is to be imposed only for selling necessaries at prices expressly prohibited.*

The case of sales by retail dealers, who are expressly excepted from the provisions of Section 5, is expressly provided for by the provisions of Section 25, quoted above.

Where one part of a statute is susceptible of two constructions and the language of another part is clear and definite and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render the clauses harmonious.

36 Cyc. 1132.

In construing a statute the legislative intent is to be determined from a general view of the whole act, with

reference to the subject matter to which it applies and the particular topic under which the language is found.

36 Cyc. 1128, and Notes 55 and 56.

It is the duty of the Court, so far as practicable, to reconcile the different provisions so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each.

36 Cyc. 1129, and notes.

Where general terms or expressions in one part of a statute are inconsistent with more specific and particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will.

36 Cyc. 1130-1131.

Where a statute includes both a particular and also a general enactment, which in its most comprehensive sense would include what is embraced in the particular one, the particular enactment must be given effect, and the general enactment must be taken to embrace only such cases within its general language as are not within the provisions of the particular enactment.

Sanford v. King, 19 S. D. 334, 103 N. W. 28;
36 Cyc. 1131.

Sales by retail dealers are covered by the particular provisions of Section 25—are excluded from the provisions of Section 5, and are not embraced in Section 4.

In expounding one part of a statute resort should be had to every other part, including even parts that are unconstitutional, or that have been repealed.

New York Saving Bank v. Field, 3 Wall. (U. S.) 495, cited in 36 Cyc. 1132.

If it should be held that Section 4 prohibits the sale of necessaries at an unjust or unreasonable price, it also prohibits various other things, and if Section 5 or Section 25 contains provisions for fixing the price of necessaries, and punishing those who exceed such prices after notice thereof, then we have a case of one section dealing with the subject in a general way and another section dealing with it in a definite and particular manner.

It is said by the learned author on Statutes in Cyc.:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized if possible with a view to give effect to a consistent legislative policy, and as to the extent of any necessary repugnancy between them, the special will prevail over the general statute."
>
> 36 Cyc. 1151.

So, for plainer reasons it must be true that if there is one section of a statute dealing with a subject in general and comprehensive terms (as Section 4), and other sections dealing with a part of the same subject (Sections 5 and 25) in a more minute and definite way, the three should be read together and harmonized if possible, with a view to give effect to a consistent legislative policy, that policy in this instance, it seems very clear, is only to regulate prices, after inquiry and determination by the executive branch of the Government, and after admoni-

tion to the citizens in respect to the rates, charges and prices which they may exact in dealing in necessaries.

We think it unnecessary to enter upon any discussion of the spirit in which the statute should be construed. It is a criminal statute. So far as its purpose is to prevent the sale of necessaries at exorbitant prices after inquiry and determination of what is just and fair, and notice given to dealers forbidding them to exact unfair prices, its purpose is beneficent, and compliance with its provisions is not difficult; but however beneficent the purpose of the statute, its scope will not be expanded to include acts which are not clearly described and provided for, and if there is doubt as to whether the act charged, —namely, a sale of necessaries not alleged to be in violation of any price theretofore fixed—is embraced in the prohibition of the statute, *that doubt is to be resolved in favor of the defendant.*

See Leonard v. Bosworth, 4 Conn. 421, holding that to subject a party to a penalty for violation of a statute it is not sufficient that the offense is within the mischief, if it be not within the literal construction of the statute.

36 Cyc. 1186-7, note 52.

It must be admitted to be a principle of universal justice that all persons are entitled to the equal protection of the law. We do not purpose in this brief to discuss the constitutionality of a statute which should deny this principle, but we think it is a safe canon of construction to construe all laws, if possible, so that this principle may not be violated. This principle is infringed if some citizens dealing in necessaries are protected by notice of the

price at which they may lawfully sell, and citizens dealing in the same necessaries are liable to punishment without such notice. We avoid this situation if we conclude that Section 4 does not refer to price taken for goods supplied; but that "price" is covered by Section 25, and *possibly* by Section 5. If we are correct, provision for fixing prices is specifically made by the statute, and punishment for exceeding the prices fixed is expressly provided.

THE CONSTITUTIONALITY OF THE LAW.

The question of the constitutionality of the law because of the indefiniteness of the words "unreasonable rate or charge," does not, of course, arise in this case if our construction of the law is correct. We heartily agree with the opinion of the learned District Judge, that the language of the section is entirely too indefinite for a valid criminal statute, if Congress has attempted to require a dealer in necessaries to judge at his peril of the price he may take when he is lawfully authorized to make the sale. In our view, however, Congress has not placed the dealer in this perplexing and dangerous situation, but has only forbidden him to exact a price upon the sale of necessaries which has been expressly declared to be unjust or unreasonable.

Respectfully submitted,

JOHN A. MARSHALL,
D. N. STRAUP,
JOEL F. NIBLEY,
THOMAS MARIONEAUX,
As *Amici Curiae*.